

§ 801.32

(a) The waiting period with respect to such acquisition shall begin upon filing of notification by the offeree, pursuant to §§ 801.30 and 803.10(a)(1);

(b) The person within which the issuer of the shares to be acquired by the offeree is included shall file notification as required by § 801.30(b);

(c) Any request for additional information or documentary material pursuant to section 7A(e) and § 803.20 shall extend the waiting period in accordance with § 803.20(c); and

(d) The voting securities to be acquired by the offeree may be placed into escrow, for the benefit of the offeree, pending expiration or termination of the waiting period with respect to the acquisition of such securities; *Provided however*, That no person may vote any voting securities placed into escrow pursuant to this paragraph.

Example: Assume that "A," which has annual net sales exceeding \$100 million, makes a tender offer for voting securities of corporation X. The consideration for the tender offer is to be voting securities of A. "S," a shareholder of X with total assets exceeding \$10 million, wishes to tender its holdings of X and in exchange would receive shares of A valued at \$56 million. Under this section, "S's" acquisition of the shares of A would be an acquisition separately subject to the requirements of the act. Before "S" may acquire the voting securities of A, "S" must first file notification and observe a waiting period—which is separate from any waiting period that may apply with respect to "A" and "X." Since § 801.30 applies, the waiting period applicable to "A" and "S" begins upon filing by "S," and "A" must file with respect to "S's" acquisition within 15 days pursuant to § 801.30(b). Should the waiting period with respect to "A" and "X" expire or be terminated prior to the waiting period with respect to "S" and "A," "S" may wish to tender its X-shares and place the A-shares into a nonvoting escrow until the expiration or termination of the latter waiting period.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001]

§ 801.32 Conversion and acquisition.

A conversion is an acquisition within the meaning of the act.

Example: Assume that acquiring person "A" wishes to convert convertible voting securities of issuer X, and is to receive common stock of X valued at \$80 million. If "A" and "X" satisfy the criteria of Section 7A(a)(1) and Section 7A(a)(2)(B)(ii), then "A" and "X" must file notification and observe

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the waiting period before "A" completes the acquisition of the X common stock, unless exempted by Section 7A(c) or these rules. Since § 801.30 applies, the waiting period begins upon notification by "A," and "X" must file notification within 15 days.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001]

§ 801.33 Consummation of an acquisition by acceptance of tendered shares of payment.

The acceptance for payment of any shares tendered in a tender offer is the consummation of an acquisition of those shares within the meaning of the act.

[48 FR 34433, July 29, 1983]

§ 801.40 Formation of joint venture or other corporations.

(a) In the formation of a joint venture or other corporation (other than in connection with a merger or consolidation), even though the persons contributing to the formation of a joint venture or other corporation and the joint venture or other corporation itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only, and the joint venture or other corporation shall be deemed the acquired person only.

(b) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act.

(c) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act if:

(1)(i) The acquiring person has annual net sales or total assets of \$100 million or more;

(ii) The joint venture or other corporation will have total assets of \$10 million or more; and

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(iii) At least one other acquiring person has annual net sales or total assets of \$10 million or more; or

(2)(i) The acquiring person has annual net sales or total assets of \$10 million or more;

(ii) The joint venture or other corporation will have total assets of \$100 million or more; and

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million or more.

(d) For purposes of paragraphs (b) and (c) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.

Examples: 1. Persons "A," "B," and "C" agree to create new corporation "N," a joint venture. "A," "B," and "C" will each hold one third of the shares of "N." "A" has more than \$100 million in annual net sales. "B" has more than \$10 million in total assets but less than \$100 million in annual net sales and total assets. Both "C"'s total assets and its annual net sales are less than \$10 million. "A," "B," and "C" are each engaged in commerce. "A," "B," and "C" have agreed to make an aggregate initial contribution to the new entity of \$18 million in assets and each to make additional contributions of \$21 million in each of the next three years. Under paragraph (d), the assets of the new corporation are \$207 million. Under paragraph (c), "A" and "B" must file notification. Note that "A" and "B" also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for \$69 million. "N" need not file notification; see § 802.41.

2. In the preceding example "A" has over \$10 million but less than \$100 million in sales and assets, "B" and "C" have less than \$10 million in sales and assets. "N" has total assets of \$500 million. Assume that "A" will acquire 50 percent of the voting securities of "N" and "B" and "C" will each acquire 25 percent. Since "A" will acquire in excess of \$200 million in voting securities of "N", the size-of-person test in § 801.40(c) is inapplicable and "A" is required to file notification.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34434, July 29, 1983; 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001]

§ 801.90 Transactions or devices for avoidance.

Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction.

Examples: 1. Suppose corporations "A" and "B" wish to form a joint venture. "A" and "B" contemplate a total investment of over \$100 million in the joint venture; persons "A" and "B" each has total assets in excess of \$100 million. Instead of filing notification pursuant to § 801.40, "A" creates a new subsidiary, A1, which issues half of its authorized shares to "A." Assume that A1 has total assets of \$3000. "A" then sells 50 percent of its A1 stock to "B" for \$1500. Thereafter, "A" and "B" each contribute \$53 million to A1 in exchange for the remaining authorized A1 stock (one-fourth each to "A" and "B"). "A"'s creation of A1 was exempt under § 802.30 of this chapter; its \$1500 sale of A1 stock to "B" did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisitions of stock in A1 by "A" and "B" were exempt under Sections 7A(c)(3) and (10), because "A" and "B" each already controlled A1, based on their holdings of 50 percent of A1's then-outstanding shares. Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by "A" and "B" having over \$10 million in assets. Such a transaction would be covered by § 801.40, and "A" and "B" must file notification and observe the waiting period.

2. Suppose "A" wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than \$10 million. The aggregate fair market value of the assets of the twenty